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IN THE

Supreme Court of The United States

OCTOBER TERM, 1991

AVALA OF TEXAS, INC., d/b/a THE AVALA GROUP
AND d/b/a PLYMOUTH PARK SHOPPING CENTER

AND

INTERSHOP REAL ESTATE SERVICES, INC.,
f/k/a HFA MANAGEMENT USA CO.,

Petitioners

V.

THE HONORABLE DAVID WEST
JUDGE OF THE 269TH DISTRICT COURT
HARRIS COUNTY, TEXAS

AND

THE HONORABLE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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QUESTIONS PRESENTED

Forty-six states, as well as the federal court system, currently provide litigants with some appellate remedy for new trial orders that are erroneously granted. Texas, however, is one of only four jurisdictions where litigants are at the mercy of trial court judges who are free to grant new trials on the merest of whims without fear of appellate scrutiny. At the same time, Texas does offer mandamus review of new trial orders, but has arbitrarily restricted that review to new trial orders either absolutely void or based on a perceived conflict in jury answers.

The questions presented are:

1. Whether a state that provides no appellate review of orders granting new trials, but that offers mandamus review for new trial orders that are either void or based on a perceived conflict in jury answers, may arbitrarily deny mandamus review in all other instances to litigants whose right to have an erroneous new trial order set aside is no less "clear and indisputable"?

2. Whether a state may confer on each trial court a standardless and nonreviewable power to order new trials when such orders can deprive litigants of an errorless jury verdict, and burden them with a second trial, for any reason or no reason at all?

NOTE: Petitioners reserve the right to argue Question 3 in the event that certiorari is granted on the above questions, but do not include Question 3 among the reasons for the grant of certiorari.

3. Whether a trial court commits a "clear abuse of discretion" by usurping the jury's factfinding power in ordering a new trial,
   - when the record shows ample evidence to support the jury's verdict,
   - when the new trial is ordered against one party for whom no liability issues were even submitted to the jury,
   - when the jurors submit affidavits proving that no impropriety or misconduct occurred, and
   - when the new trial is ordered solely on the vague and standardless ground of "justice"?

PARTIES

Petitioners are Avala of Texas, Inc., d/b/a The Avala Group and d/b/a Plymouth Park Shopping Center ("Avala") and Intershop Real Estate Services, Inc., f/k/a HFA Management USA Co. ("Intershop"). Petitioners were the defendants in the underlying lawsuit and the relators in the original mandamus proceeding from which this petition for writ of certiorari arises.

Respondents are the Honorable David West, Judge of the 269th Judicial District Court of Harris County, Texas, and the Honorable Court of Appeals for the First District of Texas (the "First Court of Appeals"). Judge West and the First Court of Appeals were also the respondents in Petitioners' original mandamus proceeding in the Texas Supreme Court.

The real parties in interest are the plaintiffs in the underlying lawsuit: Gregorio Garcia, Alicia Nicole Garcia, Robert G. Wilson, and Theresa S. Wilson (the "Plaintiffs"). The underlying lawsuit is styled *Gregorio Garcia, Individually and as Surviving Husband of Patricia Wilson Garcia and as Next Friend of Alicia Nicole Garcia, and Robert G. Wilson and Theresa S. Wilson, Individually and as Surviving Parents of Patricia Wilson Garcia v. Avala of Texas, Inc., d/b/a the Avala Group and d/b/a Plymouth Park Shopping Center, and Intershop Real Estate Services, Inc., f/k/a Intershop HFA Management USA Co.*, No. 90-13234, in the 269th Judicial District Court of Harris County, Texas.

PARENT AND SUBSIDIARY COMPANIES OF PETITIONERS

Petitioner Avala's parent company is ADIV, Inc., a Delaware corporation. Avala has no subsidiaries.

Petitioner Intershop's parent company is Intershop Holding, Inc., a Delaware corporation. Intershop has three nonwholly owned subsidiaries: Intershop Real Estate Services, Inc. of Florida, Intershop Real Estate Services, Inc. of Georgia, and Intershop Real Estate Services, Inc. of Louisiana.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Petitioners, Avala and Intershop, respectfully pray that a writ of certiorari issue to review the order of the Supreme Court of Texas, entered October 2, 1991, overruling Petitioners' motion for leave to file petition for writ of mandamus in the above-entitled proceeding, through which order the Supreme Court of Texas denied Petitioners review of the trial court's order granting a new trial on the sole ground that "justice" required a different result.

OPINIONS AND ORDERS BELOW

The Texas Supreme Court's order overruling Petitioners' motion for leave to file petition for writ of mandamus is reprinted as Appendix A hereto. The Texas Supreme Court's order denying Petitioners' motion for rehearing is reprinted as Appendix B hereto.

The opinion of the First Court of Appeals overruling Petitioners' motion for leave to file petition for writ of mandamus is reprinted as Appendix C hereto.

The trial court's order granting the motion for new trial is reprinted as Appendix D hereto. The trial court's order denying Petitioners' motion for reconsideration is reprinted as Appendix E hereto.

None of these orders or opinions have been officially reported.

JURISDICTION

After Plaintiffs' lawsuit resulted in a jury verdict absolving Petitioners of all liability, the trial court entered judgment on the verdict in Petitioners' favor. *See* Judgment, reprinted as Appendix F hereto. Thereafter, on July 26, 1991, the trial court granted Plaintiffs' motion for new trial. *See* App. D. The trial court denied Petitioners' motion for reconsideration on August 27, 1991. *See* App. E.

The First Court of Appeals, on September 16, 1991, issued an opinion overruling Petitioners' motion for leave to file petition for writ of mandamus. *See* App. C.

On October 2, 1991, the Texas Supreme Court overruled Petitioners' motion for leave to file petition for writ of mandamus. *See* App. A. The Texas Supreme Court denied Petitioners' motion for rehearing on October 23, 1991. *See* App. B.

The jurisdiction of this Court to review the judgment of the Texas Supreme Court is invoked under 28 U.S.C. § 1257(a) (1988).

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS INVOLVED

TEX. R. CIV. P. 320. *Motion and Action of Court on New Trials*

> New trials may be granted and judgment set aside for good cause, on motion or on the court's own motion on such terms as the court shall direct. . . .

TEX. GOV'T CODE ANN. § 22.002(a) (West 1988). *Writ Power*

> The supreme court or a justice of the supreme court may issue writs of procedendo and certiorari and all writs of quo warranto and mandamus agreeable to the principles of law regulating those writs, against a district judge, a court of appeals or a justice of a court of appeals . . . .

U.S. CONST. amend. XIV, § 1.

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Patricia Wilson Garcia was stabbed to death while attempting to buy stamps at a self-service postal island in a shopping center parking lot. She was in her seventh month of pregnancy at the time. Her murderer was never caught. Mrs. Garcia's husband, daughter, and parents sued Petitioner Avala (the owner of the shopping center) and Petitioner Intershop (the manager of the shopping center) for

negligence claiming that inadequate security was responsible for her murder.

During the seven-day trial, Plaintiffs presented evidence attempting to blame the murder on deficient security at the shopping center. Petitioners challenged Plaintiffs' evidence and introduced their own evidence that the murder was unforeseeable, that Petitioners acted reasonably under the circumstances, and that no reasonable extra security measures would have prevented the attack. After the parties rested, Plaintiffs elected not to submit any jury issues concerning the liability of Petitioner Avala (the shopping center owner), but instead decided to proceed solely against Petitioner Intershop (the shopping center manager).

The jury returned a 10-2 verdict absolving Intershop of all liability by answering "No" to the following question:

> Did the negligence, if any, of Intershop Real Estate Services, Inc. proximately cause the occurrence in question?

See Jury Charge and Verdict, reprinted as Appendix G hereto, at G-4. After the verdict, Judge West called the jurors into his chambers and told them that he agreed with their verdict and that they had made the right decision. *See* Defendants' Motion for Reconsideration, reprinted as Appendix H hereto, at H-13, H-19, H-21, H-23, H-28, H-29.[1] Judge West then entered judgment on the verdict. *See* App. F.

Plaintiffs filed a two-page motion for new trial, contending solely that the jury's verdict was "against the greater weight and overwhelming preponderance of the evidence." *See* Plaintiffs' Motion for New Trial, reprinted as Appendix I hereto, at I-1. Without specifying any reason, Judge West

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[1] The cited pages are to individual juror affidavits attached to Defendants' Motion for Reconsideration.

entered an order granting Plaintiffs' motion for new trial. *See* App. D. Inexplicably, Judge West granted the new trial as to both Petitioners, even though Plaintiffs had waived their right to proceed against Petitioner Avala by failing to request any jury issues concerning Avala's liability. *See* App. H at H-2 to H-3.

Petitioners responded to the new trial order by filing a motion for reconsideration, attaching affidavits from the ten jurors who comprised the majority. *See id.* at H-6 to H-7, H-12 to H-29. These affidavits showed that the jury had heeded Judge West's admonition not to be swayed by sympathy or passion and that they had considered all the evidence, but that they did not believe that Plaintiffs proved their case. *See id.* Furthermore, these affidavits demonstrated that Judge West had abused his discretion by substituting his view of the evidence for the jury's view since the jury — the supreme arbiter of fact in our justice system — had decided the fact issue without any impropriety or misconduct. *See id.*

Petitioners' motion for reconsideration also first raised the federal question whether the trial court's new trial order deprived Petitioners of due process under the United States Constitution. Citing specifically to the Fourteenth Amendment and to several decisions of this Court, Petitioners argued that the new trial order violated Petitioners' federal due process rights since Petitioners, having won an errorless jury verdict, were not entitled under Texas law to mandamus or appellate review of the new trial order.[2] *See id.* at H-8 to H-9.

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[2] In Texas, a trial court's order granting a new trial is not subject to review either by direct appeal from that order, or from a final judgment rendered after further proceedings in the trial court. *Cummins v. Paisan Constr. Co.*, 682 S.W.2d 235, 236 (Tex. 1984); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (West Supp. 1991) (excluding new trial orders from

Judge West denied Petitioners' motion for reconsideration without addressing the federal due process issue. *See* App. E. Indeed, at the hearing on Petitioner's motion, Judge West refused to discuss why he ordered the new trial. *See* Transcript of Hearing on Motion for Reconsideration, relevant excerpts of which are reprinted as Appendix J hereto, at J-3. Without explanation, Judge West tossed out the verdict on the vague and standardless ground that "justice" required a new trial. *See id.*

Petitioners then initiated an original mandamus proceeding in the First Court of Appeals praying that a writ of mandamus issue directing Judge West either (1) to set aside the new trial order and render judgment on the jury's verdict, or (2) to issue a new trial order detailing how the verdict was against the great weight and preponderance of the evidence. *See* Petition for Writ of Mandamus, reprinted as Appendix K hereto, at K-25. By this petition for mandamus, Petitioners expressly sought to challenge the constitutionality of Texas law shielding new trial orders from any review whatsoever unless those orders are wholly void or based on a perceived conflict in jury answers.[3] *See id.* at K-3.

Petitioners' constitutional challenge again relied explicitly on the Fourteenth Amendment and on this Court's precedent. *See id.* at K-19, K-21. Petitioners raised federal questions of both due process and equal protection, arguing that "[t]he Texas judicial system provides some kind of review

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list of appealable interlocutory orders). An order granting a new trial is subject to mandamus review in two arbitrary instances not presented on this record: (1) when the trial court's order is absolutely void, and (2) when the trial court's order is based on a perceived conflict in jury answers. *See Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985) (original mandamus proceeding). The rule limiting mandamus review to these two exceptions represents an arbitrary and irrational anomaly of Texas jurisprudence. *See* discussion *infra* note 25.

[3] *See* authorities cited *supra* note 2.

for every type of trial court order, and the peculiar exemption of new trial orders from any review contravenes the due process and equal protection clauses of the United States and Texas Constitutions." *See id.* at K-19.

These federal questions were also raised by Plaintiffs' response to the petition for mandamus. One of the "QUESTIONS PRESENTED" by Plaintiffs was: "Whether the long-standing rule that trial court orders granting a new trial are not reviewable by writ of mandamus violates either the Texas or U.S. Constitution?" *See* Answer to Petition for Writ of Mandamus, reprinted as Appendix L hereto, at L-3; *see also id.* at L-5 to L-8 (relying almost exclusively on Supreme Court precedent in arguing the federal questions).

Without addressing the federal questions presented, the First Court of Appeals issued a per curiam opinion denying Petitioners leave to file the petition for writ of mandamus. *See* App. C; Motion for Leave to File Petition for Writ of Mandamus, reprinted as Appendix M hereto.[4]

Petitioners then initiated an original mandamus proceeding in the Texas Supreme Court, naming Judge West and the First Court of Appeals as respondents. *See* Petition for Writ of Mandamus, reprinted as Appendix N hereto. Petitioners implored the Texas Supreme Court, as the court of last resort in the state, to decide the question whether a new trial order can be reviewed through a mandamus proceeding when litigants have no right to appeal such an order. *See id.* at N-26. Petitioners prayed that a writ of mandamus issue (1) directing Judge West to set aside the new trial order and

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[4] The Texas Rules of Appellate Procedure require that a motion for leave to file accompany a petition for writ of mandamus. TEX. R. APP. P. 121(a)(1), 211(a). "If the court is of the tentative opinion that relator is entitled to the relief sought, the motion for leave to file will be granted, the petition filed, and the cause placed upon the docket. Otherwise, the motion will be overruled." TEX. R. APP. P. 121(c).

to render judgment on the jury's verdict; or (2) directing Judge West to issue a new trial order detailing how the verdict was against the great weight and preponderance of the evidence; or (3) directing the First Court of Appeals to grant leave to file the petition for mandamus and to determine whether Judge West abused his discretion. *See id.* at N-1 to N-2 & n.1, N-27.

By this petition for mandamus, Petitioners renewed their constitutional challenge to the Texas rule shielding new trial orders from review. *See id.* at N-4. Once again, Petitioners relied on the Fourteenth Amendment and on this Court's precedent in posing their federal constitutional challenge on due process and equal protection grounds. *See id.* at N-20, N-22. Once again, these federal questions were briefed and argued by Plaintiffs in responding to the petition for mandamus. *See* Answer to Petition for Writ of Mandamus, reprinted as Appendix O hereto, at O-3, O-6 to O-8.

The Texas Supreme Court rejected Petitioners' federal due process and equal protection challenges, issuing an order denying Petitioners leave to file the petition for mandamus. *See* App. A; Motion for Leave to File Petition for Writ of Mandamus, reprinted as Appendix P hereto.[5]

Still convinced that the new trial order should be reviewed, Petitioners filed a motion for rehearing on the petition for mandamus. *See* Relators' Motion for Rehearing, reprinted as Appendix Q hereto. Petitioners reiterated their constitutional challenge to the Texas rule shielding new trial orders from review. *See id.* at Q-3. On October 23, 1991, the Texas Supreme Court issued an order overruling Petitioners' motion for rehearing, ending Petitioners' quest for state relief on the federal questions presented. *See* App. B.

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[5] *See also supra* note 4 (explaining Texas procedure governing motions for leave to file petitions for mandamus).

Beginning December 9, 1991, Petitioners will be forced to endure the hardship of a second trial at great expense and for no reason other than the trial judge's vague and standardless notion of "justice." Notwithstanding that further proceedings remain on Plaintiffs' underlying lawsuit, Petitioners invoke this Court's jurisdiction over the Texas Supreme Court's order denying leave to file the petition for mandamus since that order rejected Petitioners' federal due process and equal protection challenges.[6]

There are three reasons why this Court's jurisdiction is appropriate. First, the merits of Petitioners' constitutional challenges, which were presented and terminated in an original mandamus proceeding, are wholly separate from and independent of the merits of Plaintiffs' lawsuit.[7] *See Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963); *Local No. 438, Constr. & Gen. Laborers' Union v. Curry*, 371 U.S. 542, 548-49 (1963). Second, should Petitioners' prevail upon retrial of the underlying lawsuit, the federal questions will be mooted; should Petitioners lose upon retrial, state law[8] precludes appellate review of the new trial order. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 478-79, 481

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[6] Although the Texas Supreme Court's order did not "in direct terms" reject Petitioners' federal constitutional challenge, the "necessary effect" of the order was to reject that challenge. *See New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

[7] Because original proceedings are inherently independent and collateral actions, this Court has consistently reviewed state court rulings denying mandamus. *See, e.g., Smith v. Hooey*, 393 U.S. 374, 375-76 (1969) (reviewing "an informal and unreported order of the Texas Supreme Court" refusing mandamus); *Pacific Coast Dairy, Inc. v. Department of Agric.*, 318 U.S. 285, 290-91 (1943) (reviewing dismissal of a writ of alternative mandamus); *Board of Educ. v. Superior Court*, 448 U.S. 1343, 1346 (Rehnquist, Circuit Justice 1980) (observing that denial of a petition for mandamus was final, reviewable order).

[8] *See* authorities cited *supra* note 2.

(1975). Finally, this Court's instant determination on the merits of Petitioners' constitutional challenge could preclude further litigation over Plaintiffs' lawsuit. *See id.* at 482-83.

REASONS FOR GRANTING THE WRIT

I. The Texas Supreme Court's Denial of Mandamus Review for New Trial Orders when Litigants Have No Appellate Remedy Conflicts in Principle with (a) this Court's *Daiflon* Decision and (b) Forty-Six Other State Jurisdictions.

As this Court recognized in *Allied Chemical Corp. v. Daiflon, Inc.*, an order granting a new trial is interlocutory in nature and therefore not immediately appealable. 449 U.S. 33, 34 (1980). Nevertheless, twenty-seven states now provide litigants an immediate right to appeal new trial orders,[9] and another sixteen permit discretionary appeals of such orders,[10] to relieve "aggrieved parties of the necessity of retrying cases in which valid judgments are obtained and erroneously set aside by trial courts."[11] Twelve other states,[12] as well as the federal court system,[13] allow litigants to appeal new trial orders after retrial, even though that method of review still does not eliminate the "hardship and waste resulting from the requirement that the parties proceed with a new trial merely to establish a final judgment."[14] In all,

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[9] *See* tables subdividing the methods of reviewing new trial orders by state, reprinted as Appendix R hereto.

[10] *See id.*

[11] Isadore Rabinowitz, *Appellate Review of Trial Court Orders Granting New Trials*, 8 RUTGERS L. REV. 465, 468 (1953).

[12] *See* App. R.

[13] *See Daiflon*, 449 U.S. at 34 (construing 28 U.S.C. § 2106).

[14] Rabinowitz, *supra* note 11, at 467.

forty-six states[15] and the federal courts provide litigants with some appellate remedy for new trial orders that are erroneously granted. Not Texas.

Texas is one of only four jurisdictions[16] where litigants are at the mercy of trial court judges who are free to grant new trials on the merest of whims without fear of appellate scrutiny.[17] The present case illustrates the plight that all such litigants face: Following an expensive and onerous seven-day trial, the jury's verdict is discarded, not because of insufficient evidence (which was the sole ground that Plaintiffs asserted in their motion for new trial),[18] not because of any erroneous evidentiary rulings,[19] but because the jury's answer did not accord with the trial judge's notion of "justice."[20] Even though no jury issues were even submitted on one Petitioner's liability, both Petitioners must now endure a second trial, and fund the litigation all over again, merely because the trial judge disagreed with the jury's verdict. Such caprice, hardship, and waste inflicted on litigants by the unavailability of appellate review could be alleviated, however, by allowing mandamus review of new trial orders as Petitioners have sought.[21]

In *Daiflon*, this Court addressed the issue whether mandamus is appropriate to review new trial orders when the

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[15] Some of these forty-six states provide more than one method of reviewing new trial orders. *See* App. R.

[16] Maryland, Virginia, and New Mexico are the other three. *See id.*

[17] *See* authorities cited *supra* note 2.

[18] *See* App. I at I-1.

[19] *See, e.g., Daiflon,* 449 U.S. at 33.

[20] *See* App. J at J-3.

[21] Mandamus review could materially advance the termination of the litigation, would not be overly burdensome to either party, and would be far less expensive than the cost of a new trial.

"litigant is free to seek review of the propriety of such an order on direct appeal after a final judgment." 449 U.S. at 36. That is not the issue presented here: Petitioners, and all similarly-situated Texas litigants, have "no other adequate means to attain the relief" they desire. *Id.* at 35. Thus, while mandamus might not be appropriate to review an *appealable* new trial order as in *Daiflon, id.* at 35-36, mandamus review should be available to correct an erroneous new trial order when the litigant has no adequate remedy by appeal. *Cf. Mallard v. United States Dist. Court,* 490 U.S. 296, 309 (1989) ("To ensure that mandamus remains an extraordinary remedy, petitioners must show that they lack adequate alternative means to obtain the relief they seek . . . .").

Although, according to this Court, mandamus review should be available to correct any "clear abuse of discretion"[22] or "judicial usurpation of power,"[23] the Texas Supreme Court has arbitrarily and irrationally restricted its mandamus review of new trial orders to those that are either absolutely void or based on a perceived conflict in jury answers.[24] This restriction is arbitrary and irrational because it represents an anomaly of Texas jurisprudence,[25] having no

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[22] *Mallard,* 490 U.S. at 309.

[23] *Daiflon,* 449 U.S. at 35.

[24] *See* authorities cited *supra* note 2.

[25] As early as 1872, Texas courts allowed mandamus to be used to set aside orders granting new trials. *See Lloyd v. Brinck*, 35 Tex. 1, 10 (1872) (original mandamus proceeding). The peculiar rule exempting new trial orders from review appears to have its origin in the 1911 decision of *Wright v. Swayne*, 140 S.W. 221 (Tex. 1911) (original mandamus proceeding). Without mentioning *Brinck*, the *Wright* court held that mandamus would not issue unless the new trial order was "absolutely void." *Id.* at 222. Then, in 1926, the Texas Supreme Court decided *Gulf, C. & S.F. Ry. v. Canty*, in which the court issued mandamus overturning a new trial order that was based on the trial court's

basis in the principles of law regulating writs of mandamus.[26]

In Texas, as well as in this Court,[27] mandamus is appropriate when "the trial court's order is so arbitrary, unreasonable, or based upon so gross and prejudicial an error of law as to establish abuse of discretion."[28] Because of the Texas Supreme Court's arbitrary restriction on mandamus review, however, a trial court that orders a new trial may commit the most egregious abuse of discretion, such as overturning a jury verdict merely because the trial court does not like the result reached by the jury, yet the new trial order would still not be reviewable unless it came within the two exceptions.[29]

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erroneous conclusion that the jury's findings were irreconcilable. 285 S.W. 296, 299 (Tex. 1926) (original mandamus proceeding). Although the *Canty* court relied on *Brinck* for its decision, and although no Texas court has ever overruled or modified *Brinck*, one thing is clear: later courts seized on *Wright* and *Canty* as authority for the proposition that a new trial order can be set aside on mandamus *only if* the order (1) is absolutely void, or (2) is based on a perceived conflict in jury answers. *See, e.g., Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985) (original mandamus proceeding). Borne by a misunderstanding of precedent, the rule has become entrenched in Texas jurisprudence even though there is not — and never has been — any reason for its existence. For a fuller discussion of this anomaly, see App. K, at K-16 to K-18, and App. N, at N-17 to N-19.

[26] *See* TEX. GOV'T CODE ANN. § 22.002(a) (West 1988) (authorizing Texas Supreme Court to issue all writs of mandamus "agreeable to the principles of law regulating those writs").

[27] *See* cases cited *supra* notes 22-23.

[28] *Johnson*, 700 S.W.2d at 918; *see also* Act of Feb. 21, 1927, 40th Leg., R.S., ch. 52, § 2, 1927 Tex. Gen. Laws 75-76 (recognizing that "the granting of new trials is largely discretionary with the trial court and not subject to reversal *except for abuse of discretion*") (emphasis added).

[29] *See Johnson*, 700 S.W.2d at 918. *Johnson* is internally inconsistent since it recognizes that mandamus should issue when a trial judge clearly abuses his discretion, yet it blindly adheres to

The practical effect of this restriction, which might be reasonable in states providing appellate remedies for such abuses of discretion, is unreasonably harsh on Texas litigants precisely because there is no appellate remedy for the granting of new trial orders.

The question presented is this: If a state provides mandamus review for new trial orders that are either absolutely void or based on a perceived conflict in jury answers, why should mandamus review be arbitrarily and summarily denied to litigants whose right to have an erroneous new trial order set aside is no less "clear and indisputable" and who have no right to appellate review? *See Daiflon*, 449 U.S. at 36. That is to say, if a trial court's ordering of a new trial will justify mandamus review in two instances, why should mandamus not issue in other instances in which litigants can demonstrate a "clear abuse of discretion" or "a judicial usurpation of power"? *See id.* at 35; *Mallard*, 490 U.S. at 309.

As these questions suggest, the present case gives this Court an opportunity to revisit the issue posed in *Daiflon* — whether a litigant may obtain review of a new trial order by mandamus — but under vastly different facts that may require a different answer:

- Unlike in *Daiflon*, 449 U.S. at 33, the trial court here did not base the new trial order on erroneous evidentiary rulings or on insufficient evidence, but on the vague and standardless ground of "justice." *See* App. J at J-3.
- Unlike in *Daiflon*, 449 U.S. at 34 & n.1, Petitioners' application for mandamus provided the reviewing court with a complete transcript of the trial showing

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the rule restricting mandamus review of new trial orders without undertaking any meaningful abuse of discretion analysis. *Compare id.* at 917-18 (abuse of discretion analysis) *with id.* at 918 (restrictive rule).

that there was ample evidence supporting the jury's verdict and that Petitioners were entitled to have the new trial order set aside. *See* App. N at N-4 & n.2; App. K at K-4 & n.1.

- Unlike in *Daiflon*, 449 U.S. at 36, Petitioners have no way of ever obtaining review of the new trial order if not by mandamus review.

Because the Texas Supreme Court's order denying mandamus ignored these distinctions, and because these distinctions raise important and unresolved problems of due process and equal protection (discussed below), this Court's plenary consideration is essential.

II. By Precluding Any Review of New Trial Orders that Constitute Clear Abuses of Discretion, the Texas Supreme Court's Decision Raises Important and Unresolved Problems of Due Process and Equal Protection.[30]

A. Due Process

1. *By Arbitrarily Shielding New Trial Orders From the Most Minimal Judicial Scrutiny, Texas Confers on Trial Courts a Standardless Power to Order New Trials.*

The Due Process Clause of the Fourteenth Amendment "imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair." *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 33 (1981). Due process further requires that, when a state has created appellate remedies, it must "offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal."

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[30] It is well established that corporations, like Petitioners, are "persons" within the meaning of the Fourteenth Amendment. *See Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985).

Evitts v. Lucey, 469 U.S. 387, 405 (1985).[31] In Texas, the only standards guaranteeing the fairness and reviewability of new trial orders are (1) that such orders be issued while the trial court has plenary power, and (2) that if the orders are based on a perceived conflict in jury answers, the answers must truly be irreconcilable.[32] A Texas trial court may order a new trial on any other basis — no matter how arbitrary, irrational, or unfounded — and yet be secure in the knowledge that its decision cannot be reviewed either on appeal or by mandamus.

The fact that forty-six states and the federal court system provide some method of reviewing new trial orders is not conclusive as to whether Texas's lack of review accords with due process, "'but it is plainly worth considering in determining whether the practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."'" *Schall v. Martin*, 467 U.S. 253, 268 (1984) (quoting *Leland v. Oregon*, 343 U.S. 790, 798 (1952) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934))).[33] As the present case illustrates, Texas's lack of review makes a mockery of the jury system by effectively allowing trial courts to toss out errorless jury verdicts for any reason or no reason at all. A litigant who has spent thousands of dollars on one trial and has fairly won a jury verdict should not have to endure a second trial, and fund the litigation all over again, based on the whim of a trial judge without at least an opportunity for review.

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[31] *See also Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1154 (2d Cir. 1986) (same), *rev'd on other grounds*, 481 U.S. 1 (1987).

[32] *See Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985) (original mandamus proceeding).

[33] *See also McKeiver v. Pennsylvania*, 403 U.S. 528, 548 (1971) (noting that practice followed in 29 states and the District of Columbia was "of more than passing interest").

By shielding from even the most minimal judicial scrutiny new trial orders that constitute clear abuses of discretion, the Texas Supreme Court has conferred on trial courts a standardless power to order new trials. The vesting of such a power in a single man or woman, without any opportunity for review, is repugnant to due process and "fair adjudicative procedure" since it fails to "guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243, 242 (1980). Here, a trial judge's individual conception of "justice" was sufficient to nullify a seven-day trial and an errorless jury verdict.

Incredibly, although there are at least as many notions of "justice" as there are trial judges, the Texas Supreme Court has explicitly upheld "justice" as a nonreviewable ground for ordering new trials.[34] Hence, a trial judge merely has to invoke the magic word "justice" in ordering a new trial and, as in this case, the new trial order will not be reviewed. Predictably, one prominent Texas litigation guide now counsels practitioners to include the word "justice" in the new trial order to avoid mandamus review.[35]

Such a "vague and standardless" ground on which to order new trials, however, "leaves judges . . . free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *See Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966). It leaves judges free to substitute their judgment for that of the jury, free to substitute their individual notions of "justice" for the jury's

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[34] *Johnson*, 700 S.W.2d at 918; *Champion Int'l Corp. v. Twelfth Court of Appeals*, 762 S.W.2d 898, 899 (Tex. 1989) (original mandamus proceeding) (per curiam).

[35] MICHOL O'CONNOR, O'CONNOR'S TEXAS RULES: CIVIL TRIAL 606 (1991).

"public conception of justice."[36] Indeed, the jury system means nothing at all if a trial court can toss out a verdict with which it disagrees in the hope that the next jury will return a verdict more to its liking. At worst, such a vague and standardless power gives the trial court *carte blanche* to order new trials for any arbitrary and irrational reason that it can pass off as "justice."

Hence, this Court's guidance is needed to determine whether the Due Process Clause permits a trial court to be invested with such a standardless and almost godlike power over litigants, and whether Texas's interest in fashioning its own rules in this area is outweighed by (1) "the powerful and independent constitutional interest in fair adjudicative procedure," *Marshall*, 446 U.S. at 243, and (2) the federal "interest in protecting the individual citizen from state action that is wholly arbitrary or irrational," *Martinez v. California*, 444 U.S. 277, 282 (1980).

B. Equal Protection

1. *Having Created a Mandamus Remedy for New Trial Orders that Are Void or Based on a Perceived Conflict in Jury Answers, Texas Cannot Arbitrarily Deny Mandamus Review to Other Litigants Aggrieved by Equally Erroneous New Trial Orders.*

Texas, like other states, is not constitutionally obligated to create appellate remedies for trial court orders and decisions. *Lindsey v. Normet*, 405 U.S. 56, 77 (1972). "When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Id.*[37]

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[36] JOHN RAWLS, A THEORY OF JUSTICE 5 (1971).

[37] *See also Lynk v. LaPorte Superior Court No. 2*, 789 F.2d 554, 565 (7th Cir. 1986) (Posner, J.) ("The state may not be constitutionally obligated to create appellate remedies but having

Although all Texas litigants aggrieved by new trial orders are denied the right to appeal,[38] the Texas Supreme Court has capriciously and arbitrarily divided these litigants for purposes of mandamus review.

The Texas Supreme Court divides new trial orders — and thus, necessarily, litigants — into "two discrete groups that are accorded radically disparate treatment." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438 (1982) (Blackmun, J., concurring). New trial orders that are granted after the trial court's plenary power has expired, or that are based on a perceived conflict in jury answers, are reviewed on mandamus by an appellate court for abuse of discretion.[39] In contrast, new trial orders not falling within these two exceptions, no matter how egregious the abuse of discretion, and no matter how extreme the judicial usurpation of power, are not even granted leave for the mandamus petition to be filed.[40]

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done so it may not arbitrarily deny them to a particular class of litigants.")

[38] *Cummins v. Paisan Constr. Co.*, 682 S.W.2d 235, 236 (Tex. 1984); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (West Supp. 1991) (excluding new trial orders from list of appealable interlocutory orders).

[39] *See Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985) (original mandamus proceeding).

[40] The unavailability of mandamus review for new trial orders not falling within the two exceptions is unfair and unequal not only compared with the reviewability of new trial orders falling within the two exceptions, but also compared with the expanding availability of mandamus review for other kinds of trial court orders in Texas. *See, e.g., Henderson v. O'Neill*, 797 S.W.2d 905, 905 (Tex. 1990) (original mandamus proceeding) (issuing mandamus to vacate an order granting a change of venue even though interlocutory venue orders are appealable after trial); *Masinga v. Whittington*, 792 S.W.2d 940, 940-41 (Tex. 1990) (original mandamus proceeding) (conditionally granting mandamus to vacate an order preventing the videotaping of a deposition); *Garcia v. Peeples*,

Because "the function of legal process is to minimize the risk of erroneous decisions," *Addington v. Texas*, 441 U.S. 418, 425 (1979), it must seriously be doubted whether the Texas Supreme Court's arbitrary and capricious classification of new trial orders rationally advances the legitimate governmental objective of minimizing legal error. *See Logan*, 455 U.S. at 439 (Blackmun, J., concurring). Under the Texas scheme, even new trial orders constituting clear abuses of discretion may routinely be denied review because the reviewing court's analysis does not focus on abuse of discretion or judicial usurpation of power, but on whether the new trial order fits neatly into one of two arbitrarily predetermined review categories. Thus, litigants aggrieved by new trial orders not falling into one of these categories may be forced to retry cases even though valid judgments were obtained but erroneously set aside by trial courts.

Petitioners, on behalf of all such litigants, seek this Court's determination whether such an arbitrarily restrictive method of reviewing new trial orders passes muster under the Equal Protection Clause.

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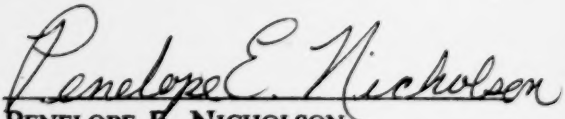
734 S.W.2d 343, 347-48 (Tex. 1987) (original mandamus proceeding) (conditionally granting mandamus to vacate pretrial discovery order limiting the use of discovery documents). In light of the widespread availability of mandamus relief, mandamus should also be available to vacate erroneous new trial orders. An order granting a new trial is the most onerous of all trial court orders; with mandamus available to resolve squabbles over whether particular documents are discoverable or whether a particular deposition should be videotaped, it is absurd for mandamus not to be available to determine whether a party who has fairly prevailed in one trial should have to face the expense and burden of a second trial.

CONCLUSION

For all the foregoing reasons, this petition for certiorari should be granted. Petitioners reiterate that Question 3 is presented herein, not as a reason for granting certiorari, but because this is the only opportunity for Petitioners, given the current posture of this case and the law, to obtain review of the trial court's order granting a new trial. If Petitioners are correct in urging that the Texas Supreme Court's order denying mandamus review violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment, then this Court should so hold and should grant the relief that the Texas Supreme Court should have granted including directing that the trial court's new trial order be set aside. Alternatively, this Court should remand this matter to the Texas Supreme Court for appropriate disposition including a full determination whether the trial court abused its discretion in granting a new trial and whether mandamus should issue. Finally, this Court should grant Petitioners all appropriate relief to which they may be entitled.

Respectfully submitted,



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